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No. 89-594

In The

Supreme Court of the United States

October Term, 1989

CLIFT C. LANE and DOROTHY P. LANE,

Petitioners,

v.

JOHN E. PETERSON, JR., WALTER W. MINGER, and EDWARD H. COVELL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

It is difficult to respond with equanimity to Petitioners' Statement of the Case. It so grossly misrepresents and distorts the record in this case that specific corrections are inadequate. Respondents refer the Court to the Appendix hereto, which is the District Court's original Memorandum Opinion of July 2, 1987, in support of the judgment which Petitioners are now seeking to set aside under Rule 60(b) of the Federal Rules of Civil Procedure. What follows is a summary of that opinion.

Petitioners and the companies of which they were the sole owners filed a Chapter 11 proceeding in November, 1982. A Plan of Reorganization was confirmed in August, 1984. It included provisions for a Special Panel to advise Petitioners on the management of their companies. Respondents were the members of that panel. They did give advice to Petitioners, which Petitioners chose to ignore. Because of persistent mismanagement, the bankrupts defaulted under the Plan of Reorganization. They were facing imminent liquidation, including liquidation of Petitioners' personal assets, since Petitioners had personally guaranteed about half of their companies' liabilities, which exceeded $100,000,000.

Petitioners tried to sell their companies for more than eight weeks. They were unable to secure a single offer during that time. The companies had a negative net worth of more than $8,000,000 and there was overwhelming evidence that Petitioners' stock in the companies had no value. It is not true that Respondent Minger "received an offer to purchase the Lane Companies after the Special Panel assumed control." (Petition 4.) On June 24, 1985,

Don Tyson of Tyson Foods, Inc., told Respondent Minger that he would be interested in operating the companies for sixty days after the Petitioners were out of management to see if he wanted to buy the companies. No follow-up on this conversation ever took place.

Creditors, aware of the likelihood of liquidation, indicated that they wished Petitioners to give up management and ownership of the companies. Petitioners urged Respondents to take over as directors under the Plans' provisions before the cure dates on the numerous defaults expired. Respondents originally refused. They finally agreed to do so, but only on condition that Petitioners give up their stock in the companies. This was in deference to the wishes of creditors that Petitioners relinquish their stock, as well as Respondents' own concern that Petitioners not be in a position to interfere with new management.

Petitioners resigned as officers and directors and assigned their stock to Respondents who received it as trustees for the companies' employees. The assertion in the Petition (p.4) that Respondents are "the sole beneficiaries of the trust" is false. *See* 851 F.2d at 197 (Appellate Court opinion on appeal of original judgment herein). The court below found that Petitioners "clearly and completely understood" the import of their actions in turning over the companies to Respondents. Petitioners were given a consulting contract paying them $150,000 over two years.

Respondents assumed management of the companies and put into effect the policies and operations they had previously and unavailingly recommended to Petitioners.

The companies began to make a profit. Respondents were able to sell off an unprofitable part of the business at a profit. Although the market for the companies' products had diminished seriously during the later period of Petitioners' management, Respondents were able to improve the quality and marketability of the companies' products.

As the companies' financial condition improved, they suddenly found themselves with a willing large-scale consumer of their product, Tyson Foods. Tyson Foods had contracted to supply poultry products to Burger King, Inc. The demand exceeded Tyson Foods' capacity, and it started buying large quantities of poultry products from Respondents' companies. Eventually Tyson Foods decided to buy the companies in order to protect its access to their productive capacities. This transaction occurred about nine months after Petitioners had transferred their stock to Respondents.

About three months later Petitioners filed this suit seeking to obtain the proceeds of the Tyson sale for themselves. Extensive discovery occurred and pre-trial and post-trial briefs were submitted by both sides. After the trial court rejected each of Petitioners' claims, Petitioners filed a motion for new trial, which was denied. They appealed to the Court of Appeals, and the judgment was affirmed. They filed a petition for rehearing, which was denied. Petitioners' new counsel, who had never been formally substituted for Petitioners' previous counsel, then filed the motion to reopen. That motion was filed more than seventeen months after the District Courts' judgment attacked herein. The motion was denied, and the District Judge awarded sanctions against

Petitioners and their attorney. That decision was affirmed on appeal. This Petition for Certiorari followed.

SUMMARY OF ARGUMENT

The District Court's Judgment and the Memorandum Opinion on which it was based clearly demonstrate that the law of Arkansas was applied in respect to every issue in the case. Petitioners are trying to relitigate issues which have already been litigated to conclusion. Rule 60(b) provides no basis for relief in these circumstances. The filing of this Petition is frivolous.

ARGUMENT

The decisions of the District Court and the Court of Appeals were based on Arkansas law. Petitioners are not entitled to relief in these circumstances under FRCP 60(b).

It is clear that the courts below recognized this as a diversity case. The original complaint had asserted it to be. This was admitted in the answer. The Court of Appeals so characterized it. (Petitioners' Appendix 2a.)

The trial in District Court went on for five days. Pre-trial and post-trial briefs to the District Court exceeded two hundred pages. Every single argument made on either side was based on Arkansas law. Nothing in the District Court's Opinion suggests that the Arkansas law was slighted or ignored. The Court of Appeals stated specifically in the decision sought to reviewed here:

> "The District Court's opinion and this Court's affirmance were based on the application of Arkansas law." (Petitioners' Appendix 2a.)

Respondents do not in any way concede that the District Court erred in its application of Arkansas law. However, even if it did, Petitioners are not entitled to use Rule 60(b) in what the Court of Appeals called "a belated effort to relitigate issues which should have been raised, if at all, on direct appeal." (Petitioners' Appendix 2a to 3a.)

In the Court below Petitioners relied on Rule 60(b)(4) as well as Rule 60(b)(6). Their Argument makes no reference to Rule 60(b)(4), which has to do with void judgments. No suggestion is made, nor could be made, that the District Court's judgment was void. Consequently that argument has been waived.

Since the judgment attacked by Petitioners' motion was rendered more than a year prior to the motion's filing, the provisions of Rule 60(b)(1), (2) and (3) are unavailable by the Rule's own terms. Petitioners' relief can come only, if at all, under Rule 60(b)(6) having to do with "any other reason justifying relief from the operation of the judgment."

Petitioners do not suggest any reason why they are entitled to the drastic relief afforded under Rule 60(b)(6) except to say that is necessary "to accomplish justice." A quick glance at the District Court's Memorandum Opinion demonstrates that there was no injustice in that decision. Petitioners advance no analysis and cite no cases similar to their own to suggest that Rule 60(b)(6) is applicable to this case. Nor do they attempt to excuse or

explain why they waited more than seventeen months to make their frivolous claim under Rule 60. The case of *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), cited by Petitioners emphasizes that such a motion must be made within a reasonable time. 108 S. Ct. at 2204. The District Court found the Petitioners' motion was untimely. (Petitioners' Appendix 6a.)

There is an equally compelling reason why Petitioners' efforts to reopen the proceedings pursuant to Rule 60(b)(6) must fail. As observed by Professor Moore: "After a decision on appeal, a party may not ordinarily reopen a judgment under clause (6) to litigate a matter that either was or could have been litigated prior to or on the appeal." 7 *Moore's Federal Practice*, ¶60.27[1] at p. 60-270 (1987). *See also Ackerman v. United States*, 340 U.S. 193 (1950). This is not the situation where developments in the law either contemporaneous with or subsequent to the initial trial court judgment have materially altered the legal topography. The legal doctrines discussed in the Petition which Petitioners claim are applicable to their case, are ancient cases. There is no reason why they could not have been cited and argued in the trial court or on the first appeal. Since the Court below rejected Petitioners' appeal initially and on rehearing, Petitioners cannot now invoke Rule 60(b)(6) on grounds that could have been raised during that appeal.

Apart from the meritless nature of the Petitioners' claims, there is an even more fundamental reason why certiorari should be denied. While the issues presented were important to the litigants, they can in no sense be construed as matters of pressing jurisprudential concern. No issue of acute public importance is presented in this

case, nor does the controversy raised herein typify issues that have divided the courts of appeals. Purely and simply, this Petition presents a dispute over the application of law to a particular set of facts. Such is not a matter that the vehicle of certiorari is designed to address.

CONCLUSION

The relief sought is not available under Rule 60(b) and Petitioners' motion was untimely and frivolous. The Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

MEMORANDUM OPINION

The plaintiffs in this action, Clift C. Lane and Dorothy P. Lane, (Lanes) individually and as trustees under the above noted trusts, commenced this action on July 30, 1986, seeking judgment decreeing an express trust for the exclusive use and benefit of the Lanes upon the proceeds of the sale, assignment and transfer of the stock in the Lane Processing, Inc., (referred to hereinafter as either LPI or the Lane companies, embracing the nineteen affiliated corporations owned by Clift and Dorothy Lane) to Tyson Foods, Inc., and ordering the defendants, as Trustees, to distribute the proceeds of such sale, assignment and transfer of stock to plaintiffs. (Count one of the complaint).

In Count two of the complaint, the Lanes seek a reformation of the declaration of trust dated July 22, 1985, so as to designate them as the sole beneficiaries thereunder. In Count three, the Lanes seek judgment decreeing a constructive trust upon the proceeds of the sale, assignment and transfer of the Lane Companies stock to Tyson Foods, Inc., with defendants as constructive trustees for the Lanes' sole and exclusive benefit and ordering defendants to distribute such proceeds to them.

The Lanes pray, in the alternative, for relief in the form of rescission in Count four of the complaint. Therein, the Lanes seek judgment rescinding the stock transfer and assignment to defendant and restoring the proceeds of the sale of the stock to Tyson Foods, Inc., to them. Further, in the alternative, the Lanes seek judgment reforming the stock transfer and assignment to reflect the

alleged agreement and intentions of the parties and distributing the proceeds of the sale of the stock to Tyson Foods, Inc., to them. (Count five).

On the date of the commencement of this action, July 30, 1986, the Lanes appeared by counsel before the Court seeking a Temporary Restraining Order without notice to the defendants. At the conclusion of the hearing and upon good and sufficient showing, the Court entered the TRO. On August 7, 1986, the Court extended the TRO to August 15, 1986 under the provisions of Rule 65(d), Fed. R. Civ. P. On August 15, 1986, the parties agreed to extend the TRO to October 14, 1986. *See*: Rule 65(b), Fed. R. Civ. P. On October 14, 1986, an Order was entered extending the TRO to December 13, 1986, upon agreement of the parties pursuant to Rule 65(b). It appears from the record that the TRO expired of its own accord without additional extension of time. No hearing was conducted nor was an Order entered on plaintiffs' Motion for Preliminary Injunction. However, the defendants have not attempted to distribute or otherwise dispose of the proceeds of the sale of the Lane Companies stock to Tyson Foods, Inc., pending resolution of the issues by the Court.[1]

The matter came to be heard on the merits in Texarkana, Arkansas, commencing May 4, 1987. The matter

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[1] However, the defendants advanced $100,000.00 to Frank Barber, an accountant who formerly worked for the Lane Companies. Mr. Barber testified that the advance is subject to refund to the defendants in event Barber does not consummate his proposed purchase of the Avanelle Motel In Hot Springs, Arkansas, by a specified date.

was tried to a completion in five days to the Court, without intercession of a jury. Thereupon, the action was taken under advisement at the conclusion of the testimony. The parties were directed to file post trial briefs on the issues as developed at trial. The briefs having been received, the Court now proceeds to a decision on the issues presented.

The Court incorporates herein findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

The Lanes testified at great length as to the history of the Lane Companies. It is sufficient to state that the Lanes developed their poultry operation from a single flatbed truck hauling feed to a vertically integrated, multimillion dollar, multistate operation consisting of some nineteen affiliated corporations. This growth spanned some thirty-five years of hard work. However, as is sometimes the case, the business outgrew the operators.

The Lanes operated three divisions of their poultry processing operation within the affiliated corporations. The divisions consisted of the Arkansas Division, the Alabama Division and the North Carolina Division. Although each was operated separately, cash generated by each division was often utilized to maintain the other divisions, especially in the years in which the economy disfavored the poultry industry.

The Lanes began to branch out into other businesses. The Lanes purchased stock in banks and savings and loan associations. By 1980, the Lanes had purchased 30% of the outstanding stock in a competing poultry company, Val-Mac, Inc. The Lanes had noted a trend in consumer

purchasing toward "further processed" poultry products.[2] Val-Mac operated facilities capable of further processing. The testimony revealed that the further processed broiler could be sold for a substantially higher price per pound as compared to the broiler or fryer as had been traditionally purchased by the consumer.

The Lanes were not capable of further processing in their plants at the time they began acquiring Val-Mac stock. Thus, in their opinion, with the purchase of Val-Mac their market position would be greatly enhanced, as would their return on their investment.

The Lanes later acquired an additional 47.5% ownership interest in Val-Mac, bringing their interest to 77.5%. Although the purchase price of between $17 and $18 million was paid in cash, the Lanes pledged 1.1 million shares of the Val-Mac stock to Worthen Bank and Trust Company of Little Rock in return for a loan of $10 million. A refinancing agreement was executed to memorialize the transaction. The lending arrangement was in the form of a participation loan with other banking institutions carrying a portion of the indebtedness. Mr. Lane testified that this participation agreement increased the loan limit to $18 million on this transaction. The Lanes'

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[2] "Further processing" of poultry entails more than the usual procedure employed in processing birds. The term utilized extensively at trial to describe this further processed bird is a "WOG", without giblets. Generally, the further processed bird is deboned and the meat is fashioned into a variety of products sold as a convenience to the consumer. Examples of such WOG include the chicken fillet, chicken nugget and other specialty poultry products.

purpose in financing the transaction in this manner was to hedge against the down cycle in the poultry industry.[3]

Also, the Lanes acquired an Arkansas bank and 44% of the outstanding stock in a Denver, Colorado, savings and loan association, 1st S & L. Mr. Lane testified that in 1981 he received an offer to buy the 1st S & L stock at a potential profit of $15 million. (The offer was to purchase the 550,000 shares held by the Lanes for $44.00 per share.). However, soon thereafter, and before the transaction could be consummated, interest rates rose sharply and the profitability of the institution fell dramatically. The prospective buyer of the stock at $44 per share did not exercise his purchase rights.[4]

Mr. Lane testified that the refinancing agreement with Worthen was partially contingent upon the sale of the 1st S & L stock. When the 1st S & L deal fell through, Worthen refused to renew the loan secured by the Lanes' pledge of the Val-Mac stock. Worthen sold the loan to Tyson Foods, Inc., one of the Lanes' fiercest competitors. The Val-Mac stock was sold to Bass Brothers for $20.00 per share.

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[3] The poultry industry, as described by Mr. Lane, has a three year economic cycle. Defendant Edward Covell likewise confirmed this three year cyclical pattern. The industry has historically experienced this three year economic curve, with most losses being incurred every third year of operation.

[4] Lanes did sell the stock later, however. The stock brought only $15.00 per share or $8.25 million gross.

This course of events culminated in the Lane Companies filing for protection under Chapter 11 of the Bankruptcy Code on November 7, 1982, in the Middle District of North Carolina, Greensboro Division. The Consolidated Plan of Reorganization (Plan) contains a succinct summary of these events which led to the filing of this Chapter 11 petition.

The Lanes retained a law firm out of Washington, D.C., Arent, Fox, Kintner, Plotkin and Kahn, to represent them in the bankruptcy matter. The Arent, Fox firm had previously represented the Lanes in an unrelated matter. Mr. William Sullivan of the Arent, Fox firm handled the matter. Also, local counsel out of North Carolina was retained, the Honorable Jerry Tart (now Bankruptcy Judge for the Middle District of North Carolina).

In the course of the bankruptcy proceeding, Mr. John E. Peterson, Jr., (Peterson) a defendant herein, was appointed as an examiner of the bankrupts' estate. Peterson, a CPA, is a retired Vice President of Burlington Industries with extensive experience and training in financial and managerial matters. Through Peterson's duties as examiner, he became familiar with the operations of the Lane companies. He also was befriended by the Lanes.

On July 25, 1984, the Plan was approved. The Plan called for the creation of a Special Panel. [Plan Article VII, §7.05(l)). William Sullivan, as counsel for the Lanes, requested that Peterson serve on the Panel. The other members of the Panel, Walter W. Minger and Edward H. Covell, also defendants herein, were selected by the Lanes, subject to approval by the Bankruptcy Court after

notice to the creditors and a hearing. (§7.05(2) of the Plan.) The Plan further provided that the "(m)embers shall be independent and not presently employed by, or affiliated with, either Lane, Lane's competitors, or the Creditors." (*Id.*).

The Plan required the Special Panel to meet formally on a regular basis, but not less than quarterly. The Plan provided that at every formal meeting, the Special Panel was to review the conformity of LPI, Lane Processing, Inc., with the provisions of the Plan, and thereafter submit any relevant findings or recommendations for LPI's operations to the Board of Directors of LPI. (§7.05(4)).

Section 7.06 specified additional powers and duties of the Special Panel. Subpart (2) provided that each of the members of the Special Panel shall be an ex-officio member of one or more of the Company Committees and shall have such powers and duties as any other member of the Committees. Subpart (3) provided that the Special Panel was to receive all reports, budgets, reconciliations, and financial statements of LPI prepared in the ordinary course of business or pursuant to the provisions of the Plan and that the Panel was to have access, upon request and upon reasonable notice, to all financial and other information of LPI.

Subpart (4) of §7.06 provided that Panel was to have the authority to participate in the preparation of the capital budget (which was be prepared on an annual basis), and to review and approve said budget. Subpart (5) specifically prohibited any merger or acquisition between Lane and another entity without the Lanes first obtaining the approval of the Special Panel.

Section 7.06(7) provided as follows:

> The Special Panel shall succeed to the powers and duties of the Board of Directors of LPI only upon the following conditions:
>
> (A) The death or disability of both members of the present Board of Directors; or
>
> (B) If an Event of Default (provided for in Section 9.01) has occurred.
>
> If the Special Panel has succeeded to the powers and duties of the Board of Directors of LPI under Subsection (B) above, then the Special Panel shall continue to hold such powers and carry such duties until the Event of Default has been cured and the Special Panel certifies in writing that the condition which brought about the Event of Default has been remedied and such Event of Default is not likely to occur again.

Article IX of the Plan addresses Events of Default and Remedies. Section 9.02 provides that the Panel shall have thirty (30) days after the occurrence of an Event of Default to cure same before any Creditor might pursue any of the outlined remedies. This, in essence, granted the Panel an additional thirty day period in which to rectify any Event of Default. Where the Lanes would be allowed only thirty days to cure an Event of Default, the Panel would be afforded the luxury, if such term is appropriate under the dire financial status of the Lanes companies at the time, of sixty days to cure the default.

Section 9.02 outlines the remedies available to the creditors should an Event of Default occur and continue without being cured. The Plan specifically granted the creditors the right to declare their indebtedness due and payable without presentment, further notice or demand.

Also, the creditors were granted the right to pursue any and all remedies under their respective debt instruments, documents and agreements, as well as any remedy available under the law.

The Lanes continued to operate the affiliated companies as debtors-in-possession following appointment of the Panel. The members of the Panel performed their duties as specified in the Plan. During the course of their performance, the Panel made recommendations[5] to the Lanes in an attempt to bolster the deteriorating financial condition of the companies. However, the suggestions were not heeded.

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[5] The Lanes were attempting to develop a line of chicken sausage for marketing. This effort proved to be overly costly and nonproductive. Further, the Lanes were trucking excess laying stock, generally larger, older birds, from its Arkansas production facilities to a processing plant in Fort Worth, Texas. The testimony revealed that the Grannis, Arkansas, and Broken Bow, Oklahoma, processing plants, were not operating at capacity, yet the Lanes insisted on incurring the expense of transportation of these birds to Fort Worth.

Also, there was a lack of rational planning by the Lanes in the balance between breeder flocks and need for chicks by growers. There were substantially more eggs being produced than were necessary to meet the demand for chicks by the growers. Although the excess eggs were marketed, a loss per dozen was being incurred. The testimony revealed that the Lanes also indulged in research and development of a "leaner chicken".

The Panel recommended that each of these items be either eliminated or addressed on a rational basis. At the time, with cash flow at a critical point, these projects were draining resources which could reasonably have been expended in other areas for the long term survival of the companies.

During the period of time from confirmation of the Plan through June 1985, the Lane companies suffered staggering losses. Although these losses were in part due to the economic conditions, i.e. high feed costs, high interest rates, and low market prices, the losses were greatly a result of poor managerial decisions by the Lanes, such as noted above. The stockholders equity in the companies had diminished to a negative $8,197,237.00 by June 30, 1985, with losses for the preceding twelve months totaling $8,917,777.00.

In June 1985, the condition of the companies was such that it became apparent that each of the scheduled payments as required under the Plan could not be made. Thus, Events of Default were inevitable. The occurrence of an Event of Default without cure by August 2, 1985, would have required the Lanes to relinquish their positions as the Board of Directors and as Officers. The Panel would have been required to assume the roles of the Board of Directors under the Plan. Further, an occurrence of an Event of Default without cure could bring about foreclosure on security by creditors and liquidation of the companies.

In order to secure much of the needed capital for the operations, the Lanes had executed personal guaranties in excess of $50 million. Although the Lanes were entitled to claim exemptions for certain property under state law and the Plan provided for the retention of certain "personal assets", as defined in the Plan, in the event of a liquidation the Lanes' personal assets would be subject to the claims of creditors. (Section 9.02, noted above). The assets in jeopardy were valued in excess of one million dollars.

The Lanes made an offer to the employees and the growers whereby, in return for accepting a decrease in pay, the Lanes would issue stock to these employees and growers. This proposal caused grave concern on the part of the Panel and the creditors. The proposal was in direct contravention of the regulations of the Securities Exchange Commission and the Arkansas laws concerning stock offerings. This proposal constituted an event of default.

Approximately June 24, 1985, Tyson Foods approached defendant Walter Minger about possibly acquiring the Lane operation. This inquiry was relayed to the other two panel members. Tyson's interest was to initially operate the companies for a period of time in order to determine whether to purchase the companies. The Tyson proposal was conditioned upon the Lanes being out of the operation prior to any take over. Tyson's interest was not conveyed to the Lanes despite the fact that Clift Lane testified that he had been openly seeking a purchaser for the companies.[6] Neither Lane nor Don

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[6] Clift Lane testified at length about his efforts to sell the companies prior to divestment. Lonnie A. "Bo" Pilgrim, the owner of Pilgrim's Pride, an independent poultry company, testified that he made more than one offer to purchase the companies both from the Lanes and from the Panel after divestment. However, Mr. Lane refused Pilgrim's offers as being too low. The Panel also believed that Pilgrim's offers were not reasonable.

Pilgrim's testimony is viewed by the Court as being biased. Pilgrim's credibility is tainted by his attitude toward

(Continued on following page)

Tyson, Chairman of Tyson Foods, held the other in high esteem.

Less than one week earlier, June 19, 1985, Clift Lane had estimated that he could sell the entire operation for around $35 million. This statement was made in the course of a meeting in Greensboro, North Carolina, with the Panel and creditors. The Lanes place emphasis upon this sales price estimate because, in dollar amount, it mirrors the price paid by Tyson. However, in January

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(Continued from previous page)

the Panel. Pilgrim wanted to purchase the Lane operation. However, even according to Clift Lane, Pilgrim wanted to purchase at a "fire sale." The industry is highly competitive. The purchaser of an operation the size of the Lane companies could have gained substantially in production, output and market share.

Lane sought to sell the Alabama Division. Lane wished to utilize the funds from such a sale to stabilize the sagging cash flow in the North Carolina and Arkansas Divisions. However, the creditors refused to approve a transfer of funds from any such sale to either of the other two divisions, in that such a transfer would be contrary to the terms of the Plan. Thus, efforts to sell the companies in parts was abandoned by the Lanes.

Lane employed Donald Armbrust, a journeyman in the commercial financing area, as a broker of sorts in attempt to arrange a sale. Armbrust testified at length concerning a package he developed. He stated that the package was presented to ConAgra, Sparks Commodities and Roga, a South African entity. Armbrust produced no corroboration of the interest of these companies. Armbrust stated that the discussions with each were via telephone. Armbrust was terminated by the Panel the day following divestment. The Court is not persuaded that any of the contacts with these three entities could rise to the level of a bona fide prospect.

1986, and prior to the Tyson sale, the North Carolina Division was sold. Thus, the sales prices are not substantially equivalent.

As a result of these occurrences, the Panel scheduled a meeting in Grannis, Arkansas, at the Lane offices. The Panel met in Grannis on July 1 and 2, 1985. The Lanes paint a picture of treachery in the mill the night of July 1, 1985. It is admitted by the defendants that they met that night with Mel Sullivan, a ranking employee of Lane, and David Van Bebber, in-house counsel for the Lanes. However, the Lanes have failed to show how this otherwise innocent gathering could be construed as a planning session for a coup against them. It was established by the evidence that there is very little activity in Grannis after sundown. The panel members and Mel Sullivan simply enjoyed a casual dinner together. Thereafter, they retired to Sullivan's home for conversation, where Van Bebber joined them. Peterson testified that the usual topics at such a visit included quail hunting and fishing. Whether there was any mention of the Lane companies or their problems is not determinative of the issues herein.

On July 2, at a meeting with members of the Panel and Lanes, the cash flow within the companies was the major issue confronting the continued existence of the companies. Also, the course of action to be taken in light of the Notices of Default, which had been received by the Lanes, was a subject of discussion.

Dorothy Lane insists strongly that she and Peterson secretly met in her office on that July 2, after the regular meeting with the Panel, to discuss a proposed transfer of stock and managerial responsibility to the Panel. Dorothy

Lane contends that Peterson assured her that the Panel did not want her money and that the stock, if transferred, would be held for her and Clift as beneficial owners. This alleged promise by Peterson is the primary basis for the Lanes' claims for relief. Dorothy Lane told no one, not even her husband, about this alleged secret agreement.

Peterson specifically denied that he told her the Panel would hold the stock for the benefit of the Lanes. He admits that he stated that the Panel did not want her money. Of course, the purpose for the Panel's existence was to guide, advise and assist Clift and Dorothy Lane in rehabilitating their companies, not drive them to financial ruins. Peterson and the other Panel members recognized that it was in the best interests of the Lanes to avoid a liquidation. They sought to protect that interest. The Panel also sought to return the companies to profitable entities by solidifying their financial positions. Unless and until the Panel gained the power to manage the companies, rather than standing in the role of advisor, their efforts would be fruitless. The Lanes had previously chosen to disregard meritorious recommendations made by the Panel. *(See* note 5, *supra* and at page 17).

The Court has reviewed the testimony concerning this alleged secret agreement and finds that the testimony of Dorothy Lane lacks credibility. The strong weight of the evidence bears in favor of Peterson's version of the events occurring July 2, 1985. It is questionable that Dorothy Lane would have received such a commitment from Peterson then not relayed same to her husband. It is also questionable that Peterson would have entered an agreement of such magnitude without consulting Minger and Covell, the other two Panel members. In the event that

Peterson might have entered such an understanding, he would have surely then conveyed the matter to Minger and Covell. Both Minger and Covell disavowed any knowledge in this regard. The Panel operated upon a vote of the majority, not the ex parte, secret approval of a single member. Plan, Article 7.05(4). Peterson's assent to this transaction would have been subject to the approval of at least one of the remaining two Panel members. All other matters affecting the Panel's operation were presented in such a fashion.

Between July 2 and July 17, the creditors "floated" a proposal that the Lanes would, prior to August 2, relinquish control, as directors and as stockholders, to the Panel. (Pursuant to the Plan, on August 2 the Panel would have been required to assume such control if there was no cure of the Events of Default.) In return the creditors would release the personal guaranties and allow the Lanes a short-term consulting contract. A large creditor rejected the proposal prior to any action being taken by the Lanes. The Lanes made no mention of any secret agreement with Peterson while this proposal was being considered.

Thereafter, the Lanes came to a full realization of the depth of their dilemma. Dorothy Lane suggested to Peterson that, if she (and Clift) could be released from the personal guaranties, they would relinquish control of the companies. While the Lanes had dedicated their life's work to the companies, the retention of their remaining personal assets, including their homes in Grannis and Dallas, Texas, vehicles, jewelry, clothing and a number of farms embracing several thousands of acres of land, became of the utmost importance. The consequences of a liquidation had been explained to the Lanes by letters from their attorney, William Sullivan.

As each day passed the financial position of the companies deteriorated. The cure periods on the Events of Default were rapidly expiring. The Panel met in Washington, D.C, in an office within the Arent, Fox firm on July 17, 1985. This location was chosen primarily out of convenience to the Panel. Although the Panel had on several occasions expressed strong reservations about assuming control, the Panel unanimously agreed that they would accept an early take over of the companies, as requested by the Lanes, if and only if the Lanes relinquished all control and power in the companies, including a transfer of all stock. Covell expressed a fear that, if the Lanes did not surrender their ownership, they could assert their power to defeat any program implemented by the Panel. Also, the Panel initially believed that they could use the stock to attract new and qualified managerial personnel.

The Panel's proposal was conveyed to William Sullivan, counsel for the Lane companies, who immediately contacted the Lanes through Dorothy Lane. While the Panel was in the meeting, Sullivan relayed the Lanes acceptance of the proposal. Dorothy Lane testified that she approved of Sullivan's working with the Panel in working out the details of the transfer. Acceptance of the proposal was subject to a potential sale of the companies. Again, Dorothy Lane made no mention of the alleged secret agreement to Sullivan or any other person.

The proposal did not initially require the stock to be placed in trust. The original proposal was to "turn the stock back to the companies." However, after assessing the ramifications of such a transaction, it was determined that the companies could not operate without outstanding stock. Thus, the idea of the creation of a trust was

suggested by Sullivan. The idea of a trust was not conveyed to the Lanes.

It was the opinion of the Panel that the stock was without value, "worthless", at that time. The net worth of the companies exceeded a negative $8 million. The stock carried a negative book value. The physical conditions of the facilities had been neglected because of the cash shortfalls. Although the plan called for expenditure for capital improvements; there were simply insufficient funds to perform all the improvements that were needed.

The date of July 22, 1985, in Grannis, Arkansas, was established for consummation of the stock transfer agreement and related documents. The duty of preparing the necessary documentation was placed in the hands of Sullivan and his law firm. The final product was not concluded until late the evening of July 21, 1985, a Sunday. (Sullivan testified that he discovered a slight error which was corrected on July 22. However, the correction did not substantively alter the documents.)

The Lanes place great significance upon Sullivan's failure to teletype copies of the documents to them prior to July 22. In the course of the bankruptcy matter, Sullivan had teletyped important information to them on a regular basis. However, considering the time and effort expended in merely concluding the drafting, the time at which the product was finalized, and the fact that Sullivan then was required to travel halfway across the country, the Court finds that Sullivan did that which could reasonably have been expected under the circumstances. In fact, it required a monumental effort to conclude this phase of the transaction within the time frame allowed.

In route to the meeting in Grannis, the Panel members met at the Amfac Hotel near Dallas-Fort Worth airport on July 21, 1985. Sullivan arrived there that evening with the necessary documents. Of special importance, the Panel was for the first time made privy to general provisions of the trust instrument that evening. Upon being informed of the essence of the instrument by William Sullivan, the Panel approved the trust idea there.

The following morning the Panel and Sullivan traveled to Grannis, via Texarkana. Upon arrival around the noon hour, lunch was taken in the lunchroom at the Lane building. After lunch, the Lanes met with their tax consultants concerning the tax ramifications of their proposed transactions. Thereafter, the Panel, the Lanes, Sullivan, Tart and Van Bebber met in a conference room for execution of the documents. The "Revised Lane Agenda"[7] had been previously prepared by Sullivan. This agenda was followed strictly.

As each item was presented to the interested parties, it was briefly explained by William Sullivan. The Lanes

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[7] The Revised Lane Agenda contained thirteen separate items: (1) Execution of Statement; (2) Execution of Declaration of Trust; (3) Execution of Certification and Indemnity re lost Lane Processing, Inc. stock certificates; (4) Execution of Written Consents of Directors concerning issuance of original or replacement stock; (5) Execution of original or replacement Stock Certificates; (6) Resignations executed; (7) Written Consent of Shareholders executed; (8) Stock transfer agreement is executed; (9) Endorse and deliver stock certificates to trustees; (10) Written Consent of New Directors; (11) Agreement relating to Consulting and Certain Assets is executed; (12) New stock certificates are executed; and (13) Distribution of Press Release.

were afforded the opportunity to discuss any matter concerning any of the documents as they desired. The testimony revealed that the only controversy arising that afternoon concerned the Agreement relating to Consulting and Certain Assets, item 11 on the agenda. Clift Lane initially reacted adversely to the provision that his consulting agreement could be terminated on seven days notice after any reasonable determination of material breach of the agreement or after any liquidation or sale of the companies. Paragraph 1.03 of Agreement. After a brief conference, Dorothy convinced Clift to sign this agreement.

The Lanes make much ado about the fact that the entire agenda was completed in less than two hours. From the testimony, the Court finds that the Lanes clearly and completely understood the nature and the substance of each item which they signed that date. This is evidenced also by the fact that, while the Consultancy Agreement was the eleventh item on the agenda and the disputed paragraph was located on the third page of that document, the Lanes tended to not merely sign each item mechanically. Instead, though they did not closely scrutinize each line of each document, they did give consideration to the nature and circumstances of the transactions. Some of the items, such as the execution of statement (item 1), execution of original or replacement stock certificates (item 5), execution of resignations (item 6), execution of written consent of shareholders (item 7), and endorsing and delivering stock certificates to trustees (item 8) required little more than the time necessary for the Lanes to affix their signatures to each document.

Furthermore, the Panel understood the nature of the matters which required their signature, thus, the signing of the trust instrument and the execution of new stock certificates merely required the time necessary for the signatures to be affixed thereto.

The Lanes were provided a copy of the press releases which reflected that they had relinquished' "total control over the corporate stock and other assets" (Agenda Item 13). The meeting was then adjourned.

Although neither Lane was provided a copy of the trust instrument, the Panel was under no obligation to do so. Dorothy Lane asked Peterson for a copy but he politely refused.

Following the meeting with the Lanes, the Panel, acting as the directors of the Lane companies and the trustees of the trust holding the stock to said companies, met with management personnel, then with employees. Both groups were informed that the employees were the beneficial owners of the companies. Mrs. Lane was informed by employees and by Armbrust that the stock was being held in trust for the employees.

The Panel assumed its new duties with vigor. Each member was accompanied by lofty credentials. Peterson, a C.P.A., has much experience in financial and industrial management. Minger is a retired loan officer with the Bank of America, specializing in agri-business and finance. Covell is the retired operator of an integrated poultry business and is now director of the Federal Reserve Bank at Richmond, Virginia. Covell maintained a poultry consulting service after his retirement from the processing business.

Excess programs such as the chicken sausage project and the trucking of birds to Fort Worth were discontinued. The Fort Worth plant was closed. The production at the Grannis and Broken Bow plants, which were operating at below capacity while birds were being trucked to Fort Worth, was increased. New quality control standards were developed. The improvements in quality control cut the amount of discounts and allowances for shrinkage at the dock of a buyer. The Panel also eliminated some field and general employees and streamlined middle management. A marketing plan was also implemented.

At the time the Panel assumed control, the companies were operating on a marginal basis on their feed supplies. This was compounded by the cancellation of the bond on their bills of lading. Without feed the growers could not deliver birds for processing. Also, the lack of feed would cause the loss of egg production. The companies had no access to trade credit or institutional credit. There had been no specific marketing plan. Rather, the Lanes exercised a marketing plan of "spot dumping." There were no regular buyers for the products.

Although the Panel made the determination that a sale of all or any part of the companies would be in the interest of the trust, they concentrated their efforts toward improving profitability. The Panel determined that the Lane companies should be a going concern prior to any sales offerings. The companies would not, otherwise, have been a marketable item, at least not marketable at any reasonable price.

The Panel negotiated a contract with Tyson Foods for the delivery of WOGs. This contract was profitable and

provided a steady market. Thus, the cash flow stabilized. As time passed, the quality control continued to improve, as did efficiency and output.

Late in the fall of 1985, the Panel negotiated for the sale of the North Carolina Division to Townsend, Inc., a Delaware processing company. This sale netted, after satisfaction of the outstanding indebtedness against the North Carolina operation, a profit of $3 million to the Lane companies. The North Carolina Division had carried a substantial percentage of the indebtedness of the Lane companies. This division was also in the poorest physical condition of the three divisions.

The improvement of the companies was not totally due to the work of the Panel, however. The market stabilized with price climbing from an industry average of 4.15 cents per pound in June 1985 to 6.16 cents per pound return in March 1986. Feed cost dropped as broiler prices increased. However, upon cross examination of Mr. Covell, plaintiffs' counsel developed that under the comparative analysis of costs and other factors of different companies, i.e. Agrametrics, as developed by Mr. Covell and another individual, the Lane companies ranked dead last in the industry at the time the Panel assumed control. Although the Lane companies remained below the industry average, the Panel substantially improved the industry standing of the Lane companies within the short period of time they operated the companies.

In March 1986, the Panel began negotiating with Tyson Foods for the sale of the Lane companies. Tysons' interest in purchasing the Lane companies grew out of the Lane companies' exceptional performance on the

WOG contract. Had the Lane companies not improved in all aspects of its production, processing and marketing through the efforts of the Panel and the employees, it is extremely doubtful that Tysons would have entered such negotiations. A Letter of Intent was later executed.

In May 1986, a Stock Purchase Agreement was entered between Tyson Foods, Inc., and the Lane companies, with the Panel members acting on behalf of the Lane companies. A purchase price of $35 million was negotiated, payable in $15 million cash and an installment note of $20 million payable in ten yearly installments.

These funds have been maintained by the Panel as Trustees for the benefit of the named trust beneficiaries. The designation of beneficiaries in the trust instrument has been amended on two occasions, more clearly delineating the class of beneficiaries.

The Lane companies' bankruptcy matter has, for all practical purposes, been concluded. There remain to be made some payments to unsecured creditors who cannot be located. Otherwise, all the requirements under the Plan have been fulfilled. The Lanes have been absolved from liability on their personal guaranties which exceeded $50 million. Their interest in protecting their personal assets from creditor claims has been satisfied. The Panel avoided both liquidation of the Lane companies and foreclosure on the creditors' security, including the personal guaranties.

The Court is asked to impose an express trust for the benefit of the Lanes. Based upon the facts adduced at trial and the record as a whole, the Court finds that the entire

agreement of the parties, i.e. the Lanes and the Panel, is embodied in the instruments executed July 22, 1985. The Stock Transfer Agreement contains an integration clause, specifically reciting that the entire agreement and understanding of the parties concerning the transfer of the stock is set forth in that instrument. Under the terms of the agreement the Lanes transferred all stock and the responsibilities and burdens of ownership unequivocally. Both Clift and Dorothy Lane signed the agreement without threat, coercion or intimidation. The agreement was freely entered and for good and valuable consideration.

The burden is upon the Lanes to prove such an express trust by clear and convincing evidence. *Thom v. Geyer*, 254 Ark. 718, 497 S.W.2d 689 (1973); *Moore v. Lawrence*, 252 Ark. 759, 480 S.W.2d 941 (1972); *Wargo v. Wargo*, 226 Ark. 36, 289 S.W.2d 879 (1956). As noted heretofore, the issue of whether Peterson secretly promised Dorothy Lane that he would hold the stock in trust for the Lanes turns upon the Court's assessment of credibility. The Court having resolved this issue in favor of Peterson's version of the events occurring July 2, 1985, the plaintiffs have failed to meet their burden on this issue.

Furthermore, the Arkansas Supreme Court, as recognized by the Eighth Circuit Court of Appeals in *American Bonding Co. v. Horde*, 98 F.2d 350 (1938), has declared a strong presumption against the existence of a secretly created oral trust, such as the alleged trust herein. The Lanes have failed to overcome that presumption with the proof adduced.

The Court notes that Dorothy Lane never, prior to the time of the transfer, conveyed this alleged secret trust to

her husband, the only other party to have received any benefit from such an arrangement. The Lanes are hard pressed to establish how Clift could have been relying upon such an oral agreement at the time he executed the documents on July 22, 1985. He was acting pursuant to his own wishes to be relieved of any further obligation or responsibility to the Lane companies, notwithstanding his selfserving statement that he did not know he was giving away the entire business at the time.

Clift testified that Dorothy wanted to "get out early", with no mention of any secret trust. However, some one year later, at the commencement of this action and when he hopes to divide the proceeds of the Lane sale with Dorothy solely, Clift Lane asserts that he was acting pursuant to Peterson's promise. The Court finds this assertion to be totally without credibility.

The Lanes' theory of a constructive trust must likewise fail due to their failure to meet the high burden of proof placed upon them as cited above. The members of the Panel acknowledge that they stood in a special capacity in their roles. Under the Plan the Panel served to aid in the business for the benefit of the Lanes, and the affiliated companies, and the creditors. The Plan further provided that the Panel shall be independent and not affiliated with the Lanes or creditors.

Notwithstanding the Lanes' assertion, the Panel was not privy to any well protected business secrets or privileged, sensitive information, prior to assuming the directorship of the companies. The Panel was privy to financial information pertinent to the success or failure of

the companies. This information was likewise available to the creditors in the bankruptcy action.

Even if the Panel stood in fiduciary position to the Lanes, the Court is of the opinion that there was no breach of any duty owed. The plaintiffs have shown no culpable conduct on the part of the Panel members. Rather, the clear and convincing weight of the evidence shows that the July 22, 1985, events, and the facts leading up to that date, involved no fraud, actual or constructive, or impropriety on the part of the Panel. No violation of confidence occurred, at least, no breach by the Panel members.

The Lanes point out certain facts in support of their constructive trust assertions. The Court is of the opinion that disclosure of the Tyson interest of June 1985 would have served no useful purpose in consideration of the attitude toward Don Tyson held by Clift Lane. As evidenced by Clift Lane's testimony concerning the sale of the Val-Mac stock and Worthen's sale of the refinancing agreement and note to Tysons, Clift Lane harbored a heartfelt dislike for Don Tyson. It can be inferred that Clift Lane would rather have suffered the perils of the bankruptcy matter than sell the operations to his fiercest rival.

Insofar as whether the stock was transferred to the companies ("turned back to the companies") or placed in trust for the employees was of no consequence to the Lanes. They wished to be relieved of the struggles with no cash, the pressures, hardships, and headaches associated with their attempts to salvage the failing operation. The Lanes knew that all of their years of work was

crumbling around them. Their efforts to save the companies had failed.

The mere fact that the defendants, as Trustees and members of the Panel, acquired the stock from the Lanes does not raise any inference of dishonesty or impropriety. No credible evidence of improper conduct has been offered. Rather, the Panel acted in good faith and in fairness in connection with the events surrounding the transfer of stock and execution of the declaration of trust.

The Lanes contend that the Panel should have suggested to them that they might have a need for legal counsel on July 22, 1985. This contention is preposterous. The Lanes were business people with substantial experience in business matters. Further, Clift Lane has been described by the Eighth Circuit Court of Appeals as being a "sophisticated investor and entrepreneur." *Geldermann and Company, Inc., v. Lane Processing, Inc.*, 527 F.2d 571 [8th Cir. 1975). The Court is of the opinion that Clift Lane's status as a businessman has not materially changed since 1975.

Had the Lanes felt that they were in need of legal assistance other than from William Sullivan, they were free to so request. It was pursuant to the Lanes' consent of July 17, and upon their behalf, that Sullivan prepared the documents. The Lanes neither requested advice nor raised any questions of the propriety of any of the instruments presented, aside from the consulting agreement. The Panel was under no duty to make any suggestion pertaining to legal counsel.

The Lanes seek to reform the stock transfer agreement. The burden is upon the Lanes to show by clear and

convincing evidence either a mutual mistake or a unilateral mistake on their part and fraud or other inequitable conduct on the part of the Panel in order for the Court to reform the contract. *McDermott v. United States*, 760 F.2d 879 (8th Cir. 1985); *American Public Life Insurance Co. v. Wheeler*, 477 F.2d 1019 (8th Cir. 1973); *Harbour v. Sheffield*, 269 Ark. 932, 601 S.W.2d 595 (Ark. App. 1980); *York v. McKamy*, 175 Ark. 1170, 300 S.W.2d 317 (1927). A failure to understand the legal effect of language contained in the agreement is not a basis for reformation. *See Clampett v. Ponder*, 91 F. Supp. 533 (W.D. Ark. 1950); *Rector v. Collins*, 46 Ark. 167 (1885). A mutual mistake is one which is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. *Yeargan v. Bank of Montgomery County*, 268 Ark. 752, 595 S.W.2d 704 (Ark. App. 1980).

The instruments executed on July 22, 1985, do not violate the understanding of the parties, both the Lanes and the Panel. There was no mutual mistake. The Court is of the opinion that the instruments accomplished their intended purpose.

The Court has found herein above that there was no fraud or other inequitable conduct on the part of the Panel. Thus, the Lanes' assertion of unilateral mistake fails.

The Lanes contend that because the stock was not "turned back to the company" there exists a mistake of fact. As noted above, it was the Lanes' desire to be shed, in whatever manner, of the duties and responsibilities associated with the direction of the companies. Dorothy

Lane stated after closing the transfer that it was "better that the companies go down with you than with us." For the Lanes to now allege that they would not have executed the stock transfer as drafted had they known that the stock was being placed in trust for the benefit of the employees is at best selfserving.

The Lanes' fourth claim for relief is rescission. The burden is upon the Lanes to establish their right to rescind the stock transfer agreement by clear and convincing evidence. *Centex Construction Co. v. James*, 374 F.2d 921 (8th Cir. 1967); *Baker v. Helms*, 244 Ark. 29, 423 S.W.2d 540 (1968); *Herr v. Murphee*, 240 Ark. 834, 402 S.W.2d 393 (1966).

In the case of *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980), the Arkansas Supreme Court held:

> For rescission to be effective it must be timely. One who desires to rescind upon the ground of fraud or deceit must, as soon as he discovers the truth, announce his purpose at once, adhere to it, and act with reasonable diligence, so that all parties may be restored to their original position as nearly as possible; if he continues to treat the property involved in the transaction as his own or conducts himself as though it were still subsisting and binding, he will be held to have waived the objection and will be conclusively bound by the contract as if the fraud had not occurred. *First National Bank v. Coffin*, 184 Ark. 396, 42 S.W.2d 402; *Ratliff v. Bank of New Orleans & Trust Co.*, (1979), 266 Ark – , 586 S.W.2d 237; *McCormick v. Daggett*, 162 Ark. 16, 257 S.W. 358, 13 Am. Jur. 2d 530 (Cancellation of Instruments), §44. Furthermore, as a condition precedent to an effective rescission, the party rescinding must restore, or offer to restore, the opposite part to

his former position. *Davis v. Tarwater*, 15 Ark. 286; *Bellows v. Cheek*, 20 Ark. 424; *Stanford v. Smith*, 163 Ark. 583, 260 S.W. 435. See *also United States v. Arkansas Mill*, 216 F.2d 241 [8th Cir. 1954).

Herrick v. Robinson, 267 Ark. 576, 595 S.W.2d at 643.

In *McCormick v. Daggett, supra*, the Arkansas Supreme Court ruled that "he (the party seeking rescission) is not, says Pomeroy, 'allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved of his own obligation by rescission . . . .' " 586 S.W.2d at 239, citing Pomeroy's Equity Jurisprudence (4th ed.) vol. 2, §897.

The above-cited principles herein applied, the Court finds that the Lanes were less than diligent in their efforts to rescind the stock transfer. Notwithstanding their testimony that they began searching for an attorney soon after executing the documents, there is no corroboration of such effort. Further, the Lanes were advised by the press release on July 22 and by Armbrust and employees the following day, that they had "given away" the companies. The Lanes took no actions, either written or verbal, to dispute the nature of the transfer. The reasons offered for their silence are not persuasive. Therefore, the Court concludes that the claim for rescission is barred. The Lanes chose to challenge their transfer of the ownership only after the rehabilitation of the companies by the Panel and employees.

Furthermore, the Court is of the opinion that, because of the time elapsed between the execution of the stock transfer and other documents and the institution of this action, it would be impossible to restore the parties

to their original position. The Lanes were paid their consulting fees as provided by the agreement. The Panel sold first the North Carolina operation for a profit after satisfaction of the heavy debt laid on that division by the Lanes. The Panel made the operations profitable. The Panel was successful in negotiating an arrangement with the creditors on Alabama and Arkansas divisions to accept a reduction in their claims. Then, these two divisions were made marketable, resulting in the Tyson sale. The Lane companies are near discharge by the Bankruptcy Court in North Carolina, with only a few unsecured claims remaining to be paid. Mr. Peterson stated that he, as examiner, was required to make a final report to the Bankruptcy Court. All of this transpired without any effort by or assistance from the Lanes. To allow them to reclaim the companies they abandoned at the brink of collapse by reforming the stock transfer agreement or by rescinding the agreement would be unconscionable. Of course, had the companies not sold for a profit, this action would never have been commenced.

Without the efforts of the Panel (and the employees), the companies would have been forced into liquidation. By early takeover on July 22, the panel was able to extend the cure periods some 30 days under the Plan. Also, the Panel negotiated with creditors for forbearance on the payments while they implemented the changes necessary to pull the companies from the depths of their financial dilemma.

Even if the rescission claim had been timely made, the Court is of the opinion that the Lanes have failed to sustain their burden of proof. (See discussion of the

Lanes' claim for reformation above (finding no mutual mistake, unilateral mistake or fraud, deceit or inequitable conduct on the part of the Panel members)). The Lanes received precisely that for which they bargained, their release from the company and, in the course of events, the preservation of their personal assets by avoidance of liquidation and foreclosure on the personal guaranties. They also were provided a means of support in the consultancy contract. Valuable consideration was given by the Panel.

The Court is of the opinion that the stock transfer agreement and the related documents executed on July 22, 1985 are unambiguous. Further, the Court finds no credible evidence that the transactions, taken as a whole and separately, are unconscionable. An unconscionable contract is one which "no man in his senses and not under delusion would make on one hand, and . . . no honest and fair man would accept on the other. . . ." *Hume v. United States*, 132 U.S. 406, 411 (1889); *Geldermann & Co. v. Lane Processing Co., supra.* The Court has herein made the specific findings of fact concerning the circumstances surrounding the negotiation and execution of the instruments. The Court finds no gross inequality of bargaining power and that the Lanes were aware of and comprehended the import of their actions.

The Lanes make a plea for reformation of the trust instrument executed by the Panel, as Trustees, on July 22, 1985. The Court inquired at the close of the testimony in this case whether the parties could strike an accord on the designation of beneficiaries, possibly including the Lanes as beneficiaries under the Declaration of Trust. The trust instrument provides that "the Trustees may amend this

Declaration, so long as the provisions of Sections 4 and 5 are not amended." This power has been exercised on two occasions, more clearly delineating the beneficiaries. However, such a compromise has evidently been unacceptable by the parties.

The Court is of the opinion that the Lanes are not parties to the Declaration of Trust, thus, they have no right to reformation of that instrument.

Therefore, the Court concludes that the plaintiffs, Dorothy P. Lane and Clift C. Lanes, individually and as Trustees, have failed to sustain their burden of proof on each count of their complaint. The Court concludes that the complaint should be dismissed with prejudice and Judgment entered for the defendants. A separate Judgment shall be entered contemporaneously herewith.

Dated this 2nd day of July, 1987.

Oren Harris
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
WESTERN DIST. ARKANSAS
F I L E D
July 02, 1987
BEVERLY R. STITES, Clerk
By Deputy Clerk

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